# IN THE SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 76-195

TOBY ROBERTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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# PETITION FOR WRIT OF CERTIORARI

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TO: THE UNITED STATES SUPREME COURT,
OCTOBER TERM, 1976:

The Petitioner, TOBY ROBERTS prays that a Writ of Certiorari issue to review the judgment and Order of the United States Court of Appeals for the Ninth Circuit filed March 25, 1976, affirming the judgment of conviction for violation of Title 18 United States Code §371, and violation of Title 18 United States Code §1343 rendered in United States District Court

for the Central District of California. A timely Petition for re-hearing and suggestion for re-hearing in bank was denied June 7, 1976.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been published. A copy of the Memorandum Opinion filed March 25, 1976 appears in the Appendix hereto as Appendix "A". A copy of the Order denying Petition for Re-Hearing and Rejecting Suggestion for Re-Hearing in Bank, filed April 9, 1976, appears in the Appendix hereto as Appendix "B". A copy of the letter from the Office of the Clerk of the United States Court of Appeals for the Ninth Circuit indicating the filing and entering of Judgment is appended hereto as Appendix "C".

## JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on March 25, 1976, affirming the Petitioner's conviction of violation of Title 18 United States Code §371, and violation of Title 18 United States Code §1343. A copy of the letter Judgment appears as Appendix "C" and a copy of the Memorandum Opinion appears as Appendix "A" hereto. A timely Petition for Re-hearing and Suggestion for Re-Hearing in Bank was denied on June 7, 1976. Counsel for Petitioner received



telephonic notification of such denial. A timely Motion for Enlargement of Time within Which to File a Petition for Writ of Certiorari was filed with this Court and denied on July 7, 1976 by the Honorable William Rehnquist, Justice. A copy of the Notice of Denial of that Motion is appended hereto as Appendix "D". The Court's jurisdiction is invoked pursuant to Title 28 United States Code §1254(1) and Rule 22(2).

## QUESTIONS PRESENTED

1. Whether a search and seizure conducted by agents of a Public Utility which acts in an area exclusively within the jurisdiction of the Federal Government under the Commerce Clause provisions of Article I Section 8 of the United States Constitution, and which is strictly regulated by the Federal Communication Commission, and which has developed a practice and procedure of "private" investigation and delivery of results of that investigation to the Federal Government, contains a sufficient nexus to governmental action to fall within the limitations imposed by the Fourth Amendment to the United States Constitution?

2. Whether divulgence of private communication intercepted by a common carrier as described in Question 1 violates both the United States Constitution and the provisions of Title 47 United States Code §605 and Title 18 United States Code §2511?

3. Whether the reliability of an informant in a search warrant may be established by the opinion of the informant that he is reliable or by evidence not contained within the four corners of the Affidavit?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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Article I, Section 8 of the United States Constitution provides in part:

> "Section 8. The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."



Title 18 United States Code §2511(2)(a) provides:

> "It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication, common carrier, whose facilities are used in the transmission of wire communication, to intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: provided that said communication common carrier shall not utilize service observing or random monitoring except from mechanical or service quality control checks.

Title 47, United States Code §605 provides in part as follows:

> "Except as authorized by Chapter 119, Title 18, no person receiving, assisting in receiving, transmitting or assisting in transmitting any interstate or foreign communication by wire or radio shall divulge or publish the existence, content, substance, or purport, effect, or meaning thereof, except through

authorized channels of transmission or reception (1) to any person other than the addressee, his agent, or attorney, (2) to any person employed or authorized to forward such communication to its designation, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving; (5) in response to a subpoena issued by a Court of competent jurisdiction, or (6) on demand of other lawful authority. . . ."

## STATEMENT OF THE CASE

The Petitioner was indicted on December 3, 1974 in a six count indictment which charged the Petitioner with conspiracy and with fraud by wire pursuant to Title 18 United States Code §1343. The Petitioner was convicted of one count of conspiracy and two counts of fraud by wire.

The facts of the instant case demonstrate that a Mr. Walter Schmidt, a special agent for General Telephone Company of California, observed what be believed to be an indication of the utilization of a "blue box" on a particular telephone. Schmidt attached a peg meter which indicated that multi-frequency signals, utilized by blue boxes, were being transmitted over the



line. Schmidt then attached to the Petitioner's phone line a unit which had the capability of showing the time of day, the number dialed, and an indication when the multi-frequency signals were received. At the moment that the appropriate frequency signal was overheard, a magnetic tape recording would automatically record approximately 1 to 1-1/2 minutes of the conversation and then shut off. These recording devices were maintained on the Petitioner's telephone between May 6 and May 13, 1974. The unit disclosed alleged existence of 16 fraudulent calls.

Schmidt prepared an investigative summary which was delivered to the United States Attorney's office by way of the Federal Bureau of Investigation. Thereafter, on July 25, 1974 a search warrant was issued to search the residence and office of the Petitioner. Execution of the warrant on July 30, 1974 revealed a "blue box" device.

The Affidavit in support of the search warrant contained allegations substantiating the identity and qualifications of Schmidt. The warrant stated further that the statement of qualification was obtained from Schmidt himself. The Court of Appeals relied upon the fact that an agent of the Federal Bureau of Investigation had personally known Schmidt for 20 years. This information was at no point contained in the Affidavit. The only statements regarding Schmidt's reliability were obtained from Schmidt himself.

## REASONS FOR GRANTING A WRIT

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I

AN INTERSTATE COMMUNICATION CARRIER ACTS IN AN AREA WHICH IS EXCLUSIVELY WITHIN THE JURISDICTION OF THE FEDERAL GOVERNMENT UNDER THE COMMERCE CLAUSE OF ARTICLE I, §8 OF THE CONSTITUTION AND IS THEREFORE PERFORMING A POWER OF THE SOVEREIGN; THE NATURE OF THE TELEPHONE COMMUNICATION BUSINESS, THE STRICT REGULATION AND APPROVAL OF PROCEDURES BY THE FEDERAL GOVERNMENT, AND THE PRACTICE ENGAGED IN BY THE TELEPHONE COMPANY OF INTERCEPTING AND DIVULGING COMMUNICATIONS TO THE FEDERAL GOVERNMENT FOR THE PURPOSES OF CRIMINAL PROSECUTION RENDERS SUCH ACTIVITIES FEDERAL ACTION AND SUBJECTS THE TELEPHONE COMMUNICATION COMMON CARRIER TO THE STRICTURES OF THE CONSTITUTION, INCLUDING THE FOURTH AMENDMENT.

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In this case there can be no doubt that if the activities of Agent Schmidt, as an agent of the telephone company, fall within the parameters of the Fourth Amendment, those actions are unconstitutional. This case involves wholesale interception, recordation, and divulgence of private communication within prior judicial supervision either by way of warrant or subpoena. Thus, the crucial question to be decided is whether the telephone company maintains a "sufficiently close nexus" to the powers of the Federal Government so that the actions of the telephone company may "be fairly treated as that of the (Federal Government)." Jackson v. Metropolitan Edison Company, ___ U.S. ___, 95 S.Ct. 449, 453 (1974); Moose Lodge v. Irvis, 407 U.S. 163, 176, 92 S.Ct. 1965, 1973 (1972).

There can be no doubt that the carrying of communications by telephone falls within the exclusive federal power of the Commerce Clause of Article I Section 8 of the Constitution. Not only is this an area requiring national uniformity, see Gibbons v. Odgen, 22 U.S. (9 Wheat) 1 (1824) but also relates directly to the facilities of Interstate Commerce. Caminetti v. United States, 242 U.S. 470 (1917). Not only is this area one within the clear potential scope of the exercise of the Commerce Clause, see Wickard v. Filburn, 317 U.S. 111 (1942) but it is an area in which the Federal Government has chosen, with a great deal of specificity, to exercise that power. See generally Title 42 United States Code.

The importance of the factor of exercise of public function was recently underscored by this Court in Jackson v. Metropolitan Edison Company, supra. That case is applicable here, although strictly speaking it considered the notice of "state action" under the Fourteenth Amendment. It was there noted at 95 S.Ct. 454 that such action has been found in the exercise "by private industry of powers traditionally exclusively reserved to the state." The power there discussed included the election powers of the state, regulation of the municipal parks, and the exercise of municipal function through a company town. The Court concluded that, in their case, there was an insufficient nexus but noted that:

> "If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one." Id.

Although the Court was split in Jackson on the issue of State action, both the majority and the dissent agreed that the issue of public function is one which may render a "private enterprise" subject to constitutional stricture. See for example dissent of Mr. Justice Marshall, 95 S.Ct. at 464.

In view of the exercise by the telephone company of powers solely within the jurisdiction



of the Federal Government under the Commerce Clause, this case falls within that description discussed in Jackson of a power of a sovereign exercised by delegation of authority to a private enterprise.

Secondly, the nature of the regulation of the telephone industry together with the supervision conducted by the Federal Government through the auspices of the Federal Communications Commission places this case in the same stance as was considered in Public Utilities Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813 (1952). The regulation of the industry by the Federal Government is pervasive and extends to examination of records and access to all records (42 U.S.C. §215) inquiry into the management of business (42 U.S.C. §218) regulation of annual reports (42 U.S.C. §219) and even the authority to regulate the form of accounts and records (42 U.S.C. §220). See also generally 42 U.S.C. §151.52. Here, therefore, we find precisely the kind of sanctioning which this Court earlier recognized could be the basis of state action in the Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18 (1883). Consequently, the approval by the Government of the practices engaged in here, whether through direct acceptance of the "evidence" for use in criminal trials, or through the failure to attempt to protect the citizens interest from such encroachment (see Reitman v. Mulkey, 387 U.S. 369) were adequate to confer upon the telephone company a sufficiently public aura and nexus to federal activity to invoke Constitutional

protection.

Lastly, in contradiction to the statement by the Court of Appeal at Slip Opinion page 9, citing Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) and in addition to the above, there is definitely a "symbolic" relationship between the telephone company and the Federal Government with regard to prosecutions such as that involved here. This Court in Burton found "state action" through the close and symbiotic relationship between the state operated parking authority and a private enterprise located therein. Those factors of symbiosis exist in the present case not only with regard to the nature of the telephone company's business, but also with regard to the investigatory activity engaged in here. As indicated previously, the telephone company is highly regulated by Congress and supervised by the Federal Communication Commission. Similarly, this Court is aware of numerous cases involving "blue boxes" which have arisen under circumstances almost identical to that considered here. It is apparent that a custom has developed through which the telephone company will investigate cases looking forward to criminal prosecution and will release this information to the Government without subpoena or other lawful compulsion. The Government is aware that these activities are engaged in continually by the telephone company and is aware that it will receive information which it could not otherwise seize on its own initiative without judicial supervision. Thus, the



Government and the telephone company, while acting in consort, are able to circumvent both the protections of the wire tapping act and the Fourth Amendment.

The pervasive use of telephone facilities by the citizens of this country on a daily, hourly and minutely basis render any privacy interference of dramatic significance. The close, symbiotic relationship between the telephone company and the Government, the strict regulation by the Government, and the exercise of what is, in reality, a power exclusively within that of the Federal Government under the Commerce Clause, render the actions of the telephone company here, through their agent Schmidt, a denial of federally, constitutionally protected rights. The opinion of the Court of Appeals of the Ninth Circuit in completely overlooking these factors has rendered an opinion in contradiction to the course of authority as established by this court and perhaps most recently underscored in Jackson v. Metropolitan Edison Company, supra. A decision upon this issue is essential in order to protect against what appears to be a widespread interference with the privacy interest of the citizens of this country in telephonic communication and a later divulgence of these private communications without any judicial supervision to the Federal Government.

II

THE COURT OF APPEALS INCORRECTLY HELD THAT THE RELIABILITY OF AN INFORMANT IN A SEARCH WARRANT AFFIDAVIT MAY BE ESTABLISHED BY STATEMENTS OF THE INFORMANT CONCERNING HIS OWN RELIABILITY OR BY FACTORS RELATING TO RELIABILITY NOT CONTAINED IN THE AFFIDAVIT.

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The Court below discusses the sufficiency of the Affidavit in support of the search warrant here in question. (A copy of the Affidavit to the search warrant is appended hereto as Appendix "E"). The Court finds that the requirements of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969) were met in the Affidavit to the warrant in the present case because, according to the Court "the FBI Agent had known Schmidt for over 20 years, and had personal knowledge of Schmidt's electronic expertise and his long experience in 'Blue Box' investigation." Slip Opinion Page 15, Footnote 10.

However, the statements upon which the Court apparently relied were not contained within the Affidavit. The only mention of Schmidt's qualifications in the Affidavit were apparently obtained from Schmidt in view of the fact that



the affiant states "Mr. Schmidt stated to me his aforementioned qualifications." This lapse is crucial. For, in effect, the Court is allowing a boot strapping of reliability. Here Schmidt's reliability was established through Schmidt's own statement. Obviously, the statements of Schmidt that he is reliable is not itself reliable unless there is some independent fact upon which the Magistrate could determine such reliability. It is elementary that the warrant must be based upon its face and must be judged on its "four corners." Nathanson v. United States, 290 U.S. 41. It is only in this way that the Commissioner himself can "judge . . . the persuasiveness of the facts relied on by a complaining officer to show probable cause." Giordenello v. United States 357 U.S. 480, 78 S.Ct. 1245. The fact that an FBI Agent had known Schmidt for over 20 years, although questionably relevant, could not even be relied upon by the Court since it was not included within the Affidavit.

Absent reliance upon the information of Schmidt, it is abundantly clear that the warrant contains no sufficient basis for probable cause. Thus the determination of the Court of Appeal that reliability may be established by either consideration of material not contained in the Affidavit or by a statement of reliability obtained from the informant himself is absolutely crucial to a determination of the validity of the warrant, the seizure of the highly incriminating evidence involved, including the "blue box", and the constitutionality of the Petitioner's conviction.

III

## THERE IS A SPLIT OF AUTHORITY AMONG CIRCUITS AS TO THE NECESSITY FOR A SUBPOENA OR OTHER LAWFUL COMPULSION PRIOR TO THE DIVULGENCE OF CONVERSATIONS INTERCEPTED BY A TELEPHONE COMPANY EMPLOYEE IN ANTICIPATION OF FEDERAL CRIMINAL PROSECUTION.

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The opinion of the Ninth Circuit below determined that the exception of Title 18 United States Code §2511(2)(a) was applicable to the present case and authorized the widespread investigation and divulgence of information by agent Schmidt to the Federal Government. The Court's specific reliance upon United States v. Clegg, 509 F.2d 605, 612 (5th Cir. 1975) is misleading as directly contradictory to previous determinations by Courts in other Circuits which have appeared to require the utilization of the subpoena prior to the obtaining of the relevant information.

Hanna v. United States, 404 F.2d 405 (5th Cir. 1968) permitted disclosure of the existence of the contents of telephone conversations, prior to the amendment of 47 U.S.C. §605 at the time of the adoption of the Organized Crime Control Act, because the material was delivered to the Department of Justice in response to a subpoena duces tecum. Similarly,



in Bubis v. United States, 384 F.2d 643 (9th Cir. 1967) the Ninth Circuit determined that agents of the telephone company may intercept calls to detect fraud without violating §605, but, again, the material was not volunteered by the telephone company to the Government but was divulged pursuant to subpoena. Footnote 4 of the Bubis opinion recognizes that initial voluntary disclosure by the company may be prohibited by §605. These prior decisions, in view of the amendment to §605, which appears to further limit the authority to divulge information, are irreconcilable with the opinion of the Court of Appeal below.

Section 605 presently prohibits the divulgence of communication "except as authorized by Chapter 119, Title 18 United States Code (18 U.S.C. §§2510-2520)" except under circumstances in which the communication must necessarily be divulged during the course of the transmittal of the communication. Congress' utilization of the term "authorize" is significant in view of the fact that the Wire Tap Act (U.S.C. §§2510-2520) generally speaks in terms of "authorizations" for wire interception, indicating a judicial predetermination of the legality and necessity for that interception. Thus, on its face, §605 appears to prohibit the divulgence except as specifically provided there (including pursuant to subpoena) or pursuant to a federally authorized wire tap under the Wire Tap Act. In view of the necessity to strictly construe penal statutes in favor of the Defendant, this interpretation is not only reasonable but compelling.

Smith v. United States, 360 U.S. 1 (1959).

The Court of Appeals below, however, determined that §2511 contains a further exception by allowing disclosure "in the normal course of . . . employment while the telephone employee is 'engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier . . .'" 18 U.S.C. §2511(2)(a)(i).

The limitations upon this "exception" are that the disclosure or use of the communication must be in the "normal course of employment" and must be a "necessary incident" to the rendition of service. Neither of these factors are met in the present case.

First, even assuming arguendo, that the interception of the communications were within the normal course of employment of Agent Schmidt, the disclosure of those communications do not serve the only legitimate interest of the telephone company, which is not in criminal prosecution but rather prevention of misuse of the lines and collection of fees owing. Delivery of this material to the Federal Government in no way serves these interests, but rather deputizes Schmidt as a federal agent. Similarly, such divulgence is not "necessary" to the rendition of service or the protection of the rights of the telephone company, especially in a situation in which no attempt has been made by the telephone company to either collect fees owing or to



prevent further use of a "blue box". Again, the necessity to strictly construe penal statutes requires that the term "necessary" and the term "normal course of employment" be construed in such a manner as to both protect the Defendant and further the interest of Congress in the passage of the Wire Tap Act and the amendment to §605. For, it would be incongruous to strictly limit the authority of divulgence on behalf of telephone company employees by §605 and then give a sweeping "loop hole" through §2511. Furthermore, Congress clearly did not intend the utilization of interception techniques in cases involving mere wire fraud. The kinds of criminal activities which Congress felt demanded the utilization of such a severe technique are contained in Title 18 U.S.C. §2516, and each involves not only a serious crime, but one also infected by organized criminal activity. The utilization by one citizen of a fraudulent technique of billing certainly is not organized, and if interception were authorized by Congress it would probably be outside the scope of their Congressional power. Thus, Congress certainly did not intend to permit a federal agent to utilize this sort of investigatory tool, even after judicial scrutiny, and thus clearly could not have intended that the telephone company could in a wholesale manner invade the privacy of a telephone communication, on a widescale basis, and then later divulge the information, again without judicial scrutiny, to the Government for utilization and criminal prosecutions. Any other interpretation is frought not only with danger to the citizen through an immediate violation of its privacy

interests, but also raises the spector of "informal" participation and cooperation between "private" investigators and investigators for the Federal Government. As indicated earlier, this spector has manifested itself in very real form in "blue box" investigations which are almost uniformly the result of initial and thorough investigation including wire interception by telephone company employees with later delivery, on the proverbial "silver platter" to federal authorities. In this way, the telephone company becomes an investigatory tool of the federal government not bound by the rules, strictures, or Constitutional mandates which are designed to protect the citizen from an invasion of privacy.

## CONCLUSION

For each of the above reasons it is therefore respectfully submitted that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit.

DATED:

Respectfully submitted,

GEORGE R. MILMAN

DONALD M. RE

Attorneys for
Petitioners



## APPENDIX A

FILED
MAR 25 1976
EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellant v. CAROL ANN GOLDSTEIN, Defendant-Appellant. | 75-2207 |
| UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TOBY ROBERTS, Defendant-Appellant. | 75-2279 OPINION |

Appeal from the United States District Court for the Central District of California

Before: CHAMBERS and KOELSCH, Circuit Judges, and JAMESON,* District Judge.

JAMESON, District Judge:

In a non-jury trial appellants were convicted of conspiracy, in violation of 18 U.S.C. § 371, and fraud by wire in violation of 18 U.S.C. § 1343, through the use of an electronic device which enabled them to re-route long distance telephone calls and avoid being billed for the services.[1] We affirm.

## BACKGROUND

### Telephone Company Investigation

Walter P. Schmidt is a special agent for General Telephone Company with substantial training in electronics. Since the mid 1960s he has worked with the company's security department in the investigation of electronic toll fraud.

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*Honorable W. J. Jameson, United States Senior District Judge for the District of Montana, sitting by designation.

1. Specifically, it was charged in the indictment that appellants devised a scheme to defraud the General Telephone Company of property through the use of an electronic device known as a multi-frequency signal generator, commonly referred to as a "blue box".



A common method of perpetrating such fraud is through the use by subscribers of signal generators known as "blue boxes", which emit the multi-frequency tones used to activate long distance lines. The caller uses the device by calling a toll free number, known also as an 800 or WATS (Wide Area Telephone Service) member, and then generating the required tones to place the long distance call. As far as the billing system is concerned, the call is coming from the WATS number. In March, 1974 Schmidt was going over the computer print-outs of 800 number calls in order to detect any number dialed an excessive number of times, -- a common indication of "blue box" usage. Schmidt observed that one number had been dialed 160 times and that another had been dialed 94 times. These calls resulted in over 30 hours of long distance conversation. Schmidt found that all of the calls had been placed from a rotary phone system listed in the name of Roberts' business associate and installed in an apartment used by appellant Roberts as a business office.

This indication of blue box usage led Schmidt to place a device called a peg-count meter on Roberts' telephone line. The meter is a cumulative counter which detects and counts the number of 2600 hertz (a universal measurement) tones transmitted over the line. The peg count meter is useful in blue-box investigations because regular telephones are not equipped to tenerate 2600 hertz tones, while "blue boxes" duplicate the switching tones that are used

between long distance offices. The signal transmitted by the blue box to the long distance trunk lines is a preliminary step in making the fraudulent call.

The meter was installed from April 4 to May 6, 1974 and indicated that 105 2600 hertz tones had been sent over the line during the period. Relatively certain that a blue-box was being used on Roberts' line, Schmidt took the final step in his investigation by attaching a fraud documentation device to the line. This device detects the fraudulent call, prints out the day and time of the call, the originating number and the number called, and automatically records the first 90 seconds of the call. The device was installed on May 6 and removed on May 17 during which time 16 fraudulent phone calls were recorded.

## F.B.I. Investigation

Agent Schmidt turned over the results of his investigation to the Federal Bureau of Investigation through an "investigative summary", describing the investigative procedure, listing the number of fraudulent calls detected, and giving the name of the subscriber in whose name the suspected telephone was listed. The report was referred to the United States Attorney, who issued a grand jury subpoena requiring Schmidt to produce the records, tapes and documents resulting from the investigation. Upon examining these records, an F.B.I. agent prepared an



affidavit for a warrant to search the apartment from which the fraudulent calls were suspected to be originating. On July 25, 1974 a search warrant was issued by the United States magistrate to search the premises.

The warrant was executed on July 30. The apartment turned out to be the offices of a travel agency operated by appellant Roberts in which Goldstein worked as his secretary. When the agents entered the premises they told Goldstein and others inside not to move. Immediately thereafter Goldstein was observed placing an object in her desk drawer. The apartment was searched, and the "blue box", disguised as a calculator, was found on Goldstein's desk. An accessory to the blue box, identified as the object Goldstein was observed hiding, was found in the desk drawer.

## Court Proceedings

On the basis of the material produced by the Telephone Company and the evidence obtained in the search of the travel agency, Roberts and Goldstein were each charged in the indictment with one count of conspiracy to violate 18 U.S.C. § 1343, Fraud by Wire, and three substantive violations of the statute. Defendants moved under Rule 41(f), Fed. R. Crim. P., to suppress all of the evidence resulting from the telephone company's investigation and from the F.B.I. search. Following a hearing the motion to suppress was denied.

Both defendants waived their right to a trial by jury. A large part of the evidence was stipulated by counsel and consisted of testimony presented to the Grand Jury, evidence considered in the hearing on the motion to suppress, and voice exemplars and voice identification testimony from one of the F.B.I. agents assigned to the case. The testimony of several out-of-state witnesses was presented by stipulation, including testimony by one person who recalled receiving one of the fraudulent calls charged in the indictment. The district court, "after reviewing all of the evidence and giving full consideration to the evidence and all its aspects" found Goldstein guilty of all four counts and Roberts guilty of conspiracy and two substantive counts.

## ISSUES ON APPEAL

The numerous issues raised by the respective appellants in separate briefs may be summarized as follows:

(1) whether the telephone company's investigation was constitutionally and statutorily proper under federal law;

(2) whether the search warrant was issued without probable cause;

(3) whether the evidence should have been excluded because it was obtained in violation of state law;

(4) whether the admission of evidence by stipulation of counsel was a violation of the Sixth Amendment;



(5) whether the court erred in failing to require spectographic voice identification of the recorded conversations; and

(6) whether the evidence was sufficient to support the convictions.

## PROPRIETY OF THE INVESTIGATION UNDER FEDERAL LAW

### (a) Legislative and Judicial History

Prior to 1968, 47 U.S.C. § 605 of the Federal Communications Act was the principal federal law pertaining to the interception and disclosure of wire communications. Under § 605 close restrictions were placed on wire tapping and publishing of information obtained through wire interceptions. Despite these restrictions, however, it was held in a number of cases that § 605 did not prohibit a telephone company from monitoring its own lines to protect the integrity of its regular billing. In particular, this court recognized in Bubis v. United States, 384 F.2d 643, 648 (9th Cir. 1967) that in the enactment of §605 Congress did not intend "to deprive communications systems of their fundamental right to take reasonable measures to protect themselves and their properties against the illegal acts of a trespasser". See also United States v. Beckley, 259 F.Supp. 567, 571 (N.D. Ga. 1965). As explained in Hanna v. United States 404 F.2d 405, 406-408 (5 Cir. 1968), other sections of the Communications Act imposed an obligation on wire service carriers to prevent theft of their

services which could not be met if § 605 were held to bar carriers from conducting fraud investigations using wire taps. Under § 605, therefore, it became well established that a telephone company could monitor and disclose telecommunications on its lines to the extent "reasonably necessary" to protect its property from fraud.[2]

In 1968 Congress enacted the Omnibus Crime Control and Safe Streets Act, which in Title III established detailed rules on the interception of wire communications. Although Title III, 18 U.S.C. § 2510, et seq., prohibited most electronic eavesdropping by governmental officials without prior judicial approval, an exception was made for communication common carriers. 18 U.S.C. § 2511(2)(a) provides:

> "(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communications common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or for the protection of the rights or property of the carrier of such communication: Provided, That said communication common carrier shall not utilize service observing or random monitoring except for mechanical or service quality control checks."

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2. Other pre-1968 cases holding that 47 U.S.C. § 605 did not prevent interception of fraudulent or illegal communications include: United States v. Gallo, 123 F.2d 229 (2 Cir. 1941); Casey v. United States, 191 F.2d 1 (9 Cir. 1951), rev'd on other grounds, 343 U.S. 808 (1951); Sugden v. United States, 226 F.2d 281 (9 Cir. 1955).



At the same time 47 U.S.C. § 605 was amended to excepting wire interception and disclosures "authorized by Chapter 119, Title 18, United States Code [18 U.S.C. §§ 2510-2520]" from the disclosure limitations in § 605. Discussing the effect of these statutory changes Senate Report 1097, 2 U.S. Code Cong. and Admin. News 2182 (1968), explained:

> "Paragraph (2)(a) provides that it shall not be unlawful for an operator of a switchboard or employees of a common carrier to intercept, disclose, or use wire communications in the normal course of their employment or engage in any activity which is a necessary incident to the rendition of his service or the protection of the rights of property of the carrier. It is intended to reflect existing law

(United States v. Beckley, 259 F. Supp. 567 (D.C. Ga. 1965)). Paragraph (2)(a) further provides that communication common carriers should not utilize service observing or random monitoring except for mechanical or service quality control checks. Service observing is the principle quality control procedure used by these carriers for maintaining and improving the quality of telephone service. Such observing is done by employees known as service observers and this provision was inserted to insure that service observing will not be used for any purpose other than mechanical and service quality control."

Two cases, United States v. Clegg, 509 F.2d 605 (5 Cir. 1975), and United States v. Shah, 371 F.Supp. 1170 (W.D. Pa. 1974)[3], involving "blue box" prosecutions under factual situations similar to this case, have considered the effect of the 1968 amendments on the right of wire service carriers to monitor telephones in detecting and preventing wire fraud. Both cases, after reviewing the legislative history and case law outlined above, held, as the court stated in Clegg, 509 F.2d 612-613, that:

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3. Accord, United States v. Freeman, 373 F. Supp. 50 (S.D. Ind. 1974); United States v. De Leeuw, 368 F.Supp. 426 (E.D. Wis. 1974).



". . . [W]e feel that it is quite clear and we do hold that § 2511(2)(a), at a minimum, authorizes a telephone company which has reasonable grounds to suspect that its billing procedures are being bypassed to monitor any phone from which it believes that illegal calls are being placed. If, by the use of a device similar to a TTS 176,[4] it discovers the existence of illegal calls, § 2511(2)(a), again at a minimum, authorizes it to record audibly the salutations. Additionally, § 2511(2)(a) allows the telephone company to divulge, at least, the existence of the illegal calls and the fact that they were completed (the salutations) to law enforcement authorities and ultimately to the courts, since such disclosures are a necessary incident to the protection of the company's property rights. As authorized disclosures, such evidence is admissible in court. 18 U.S.C. § 2517(3)."[5]

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4. A "TTS 176" is a device similar to the peg count meter used in the present case to detect and count the number of 2600 hertz tones transmitted on a subscriber's telephone line.

5. 18 U.S.C. § 2517(3) provides:
(continued p. 12)

Despite the legislative history of Title III, and the cases construing the applicable statutes, both before and after 1968, appellants argue that the evidence gathered by the telephone company should have been suppressed. They contend that (1) § 2511(2)(a) is unconstitutional, (2) the investigation was in violation of this section, and (3) the disclosure to the F.B.I. was in violation of 47 U.S.C. § 605.

(b) Constitutionality of Section 2511(2)(a)

Goldstein argues that § 2511(2)(a), in allowing communications carriers to conduct investigations without prior approval, is an impermissible delegation of authority by Congress to a quasi-governmental agency, granting it authority to violate telephone subscribers' Fourth Amendment rights. Appellant cites Berger v. New York, 388 U.S. 41 (1967), and

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5. (continued from p. 11)

"Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof."



Alderman v. United States, 394 U.S. 165 (1969), which extended the Fourth Amendment to government electronic surveillance activities, as well as several cases on the general subject of searches under the Fourth Amendment. This argument, however, ignores a fundamental principle of constitutional law -- that the Fourth Amendment is a constraint on government action rather than on the actions of private individuals. Burdeau v. McDowell, 256 U.S. 465, 475 (1921). Recent decisions of the Supreme Court on the operation of the Fourth Amendment exclusionary rule have emphasized that the objective of that rule is to deter illegal government activity. See, e.g., Harris v. New York, 401 U.S. 222, 224-225 (1971); United States v. Calandra, 414 U.S. 338, 347 (1974). Although communications carriers may sometimes give the appearance of governmental agencies, they in fact are private companies which possess none of the criteria which might make them responsible under the Fourth Amendment as government bodies. See, e.g., Burton v. Wilmington Parking Authority, 365 U.S. 715, 723-726 (1961). They are engaged in the protection of their own property rights. As the court noted concerning a similar argument in United States v. Clegg, 509 F.2d at 609: "it is only when the government has preknowledge of and yet acquiesces in a private party's conducting a search and seizure which the government itself could not have undertaken . . ." that a Fourth Amendment violation occurs. The Government here in no way participated, directly or indirectly, in the Telephone

Company's investigation.[6]

Appellant Roberts advances another constitutional argument against the validity of § 2511(2)(a). He contends that while other statutes pertaining to electronic surveillance activities require agents to minimize their invasions of the suspect's right of privacy, these restrictions are not found in § 2511(2)(a), making it violative of the Equal Protection Clause as well as the Fourth Amendment. As noted, supra, private action is not proscribed by the Fourth Amendment. In addition, Roberts' argument fails to recognize the manner in which § 2511(2)(a) and pre-1968 § 605 have consistently been interpreted by the federal courts. The courts have based their holdings regarding wire fraud investigations on the proposition that a telephone subscriber is deemed to have consented to the monitoring of his calls when he violates his subscription rights; but the cases

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6. As in Clegg, "This is not a case in which the F.B.I. by secretly (or even unintentionally but effectively) deputizing the telephone company and its investigation, attempted to avoid the restrictions against wiretapping placed upon the government by the Constitution and by statute. Rather, it is the case of a private, statutorily authorized investigation by the employee of a corporation intent upon protecting its property rights". 509 F.2d at 609.



have noted, as did this court in Bubis v. United States, 384 at 648, n. 5:

> "Disclosure as well as interception [by the telephone company] is limited by the consent reasonably implied; that is, consent to such invasion of the subscriber's privacy as is necessary to protect the telephone company's property."[7]

Accord, United States v. Clegg, 509 F.2d at 612; United States v. Shah, 371 F.Supp. at 1174. Although specific minimization requirements are not set forth in § 2511(2)(a), it is clear that all wire tapping by the telephone company is subject to close scrutiny by the courts to ensure that the subscriber is not subjected to an unreasonable and overbroad investigation. We believe that Congress acted correctly in leaving to the courts the task of balancing the competing interests of the carrier, the subscriber, and the public in wire fraud investigations. There is no evidence that the investigation here was in any respect unreasonable or overbroad.

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7. In Bubis, 384 F.2d at 648, the court reversed a conviction where it was shown that the telephone company had resorted to "unreasonable and unnecessary practices".

c. Did Investigation Violate Federal Law?

Appellants next argue that if § 2511(2)(a) is found to be constitutional, the investigation conducted by the telephone violated its express provisions, as well as the provisions of 47 U.S.C. § 605.

Appellants contend first that the proviso at the end of § 2511(2)(a)(i) forbidding "service observing or random monitoring except for mechanical or service quality control checks" is a limitation on the entire statute, making telephone company wiretapping permissible only to maintain proper service and thus prohibiting the monitoring of customer lines. Appellants point for support to the Senate Report quoted supra, which they note cites United States v. Beckley, supra, involving employee fraud, as "the existing law" which the statute intends to reflect. Appellants read the statute and the Report too narrowly. The Senate Report distinguishes between monitoring for subscriber fraud and random service monitoring, which it characterizes as a "quality control procedure used by these carriers for maintaining and improving the quality of service." 2 U.S. Code Cong. and Admin, News 2182 (1968). Existing law, when § 2511(2)(a) was enacted, included not only Beckley but several other cases noted supra,[8] which upheld the validity of investigations

8. See cases cited in note 2.



of subscriber fraud. The language of the statute, the Senate Report and the cases upon which the section drew make it clear that the proviso was not intended to be a general limitation on wire fraud investigations, but is a limitation on "service observing and random monitoring" -- a broad type of surveillance not involved in this case.

Next appellants raise virtually the same argument considered in United States v. Freeman, supra, that 47 U.S.C. §605, limiting the disclosure under section 2511(2)(a), thus making these investigatory disclosures illegal. The language of the amendment to § 605 providing that, "except as authorized by Chapter 119, title 18, United States Code [18 U.S.C. §§ 2510-2520]" no person may disclose certain wire communications is a clear manifestation of Congress' intent that § 605 shall not limit § 2511 investigations. Lest there be any doubt, the Senate Report on the amendment states, "This section is not intended merely to be a reenactment of section 605. The new provision is intended as a substitute. The regulation of the interception of wire or oral communications in the future is to be governed by proposed new Chapter 119 of title 18, United States Code." 2 U.S. Code Cong. and Admin. News 2196 (1968). The conclusion of the court in Freeman, 373 F.Supp. at 52, that § 2511 is an exception to the prohibitions in § 605, is unassailable. It is clear that in enacting § 2511 (2)(a) Congress intended to permit wire service carriers to conduct investigations designed to prevent subscriber fraud.

Finally, did the procedure followed comply with § 2511(2)(a) and constitute reasonable monitoring of appellants' telephone lines? The first phase of the investigation consisted of checking computer billing reports. The telephone company's authority to keep such records and utilize them in the ordinary course of business as well as in fraud investigations is well established and is not seriously challenged by appellants. See United States v. Covello, 410 F.2d 536, 542 (2 Cir. 1969). The second stage of the investigation occurred when agent Schmidt placed a peg-count meter on appellants' line to detect the presence of multi-frequency tones. Numerous cases have upheld the authority of both the telephone company and government agents to place such devices on phone lines since the right of privacy protected by the wire tap statutes goes to message content rather than the fact that a call was placed. See United States v. Clegg, 509 F.2d at 610, and the cases cited therein at note 6. The use of the meter was not improper.

The investigation's final phase consisted of placing the fraud documentation device on the line to record the first 90 seconds of the fraudulent calls. Appellants strenuously object to the telephone company's installation of this unit and contend that its use was far beyond any investigatory technique authorized by § 2511(2)(a). As noted by the court in Clegg, 509 F.2d at 612, n. 11, however, "Recording of the salutations (of phone calls) is necessary to protect the property rights of a telephone company.



Completion of the call must be shown both in a prosecution for wire fraud and to entitle the company to charge the caller for the use of its long distance service". We agree. The recording of the first part of the fraudulent calls was sufficiently limited to protect whatever legitimate rights of privacy the appellants had, and the company's utilization of the device for 11 days was not excessive to make the investigation unreasonable.[9] This case does not involve unreasonable monitoring, as found in Bubis v. United States, supra, where the phone company recorded every phone call made or received by the suspect for three months. Rather, only fraudulent calls were recorded, the recordings were limited to the initial portion of the calls, and the device was installed only long enough to allow the company to insure that it could sustain a successful prosecution. The investigation was reasonably justified and "to an extent reasonably necessary for the company's investigation" and

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9. The recordings introduced at the trial indicate that once the recorder is activitated by a 2600 hertz tone, the first 20 seconds of the recording consist of multi-frequency tones being used to contact the phone being called and the ringing of that telephone before it is answered. Thus, only 70 seconds of actual conversation is recorded before the device shuts itself off automatically. The use of such a device seems less intrusive than having a manually operated and monitored recorder on the line, if manual detection is possible.

was, therefore, permissible. United States v. Bubis, 384 F.2d at 648.

## VALIDITY OF SEARCH WARRANT

In the recent case of United States v. Douglas, 510 F.2d 266, 268 (9 Cir. 1975), this court held that an F.B.I. agent's affidavit stating the results of a telephone company's investigation of "blue box" usage and reciting the investigatory techniques used was sufficient to establish probable cause for a search of the suspect's premises by federal agents. Douglas is controlling here. The agent's affidavit gave the telephone company investigator's name, his training, and position with the company, and summarized the investigatory procedures. The affidavit was accompanied by an investigative summary listing the number of fraudulent calls detected by the investigation and indicating the location from which the phone company suspected the calls were coming. The affidavit and investigative summary were adequate to establish probable cause.

Appellants argue, however, that despite Douglas, the affidavit failed to meet the reliability tests established in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), because the affiant did not state his own personal knowledge of Schmidt's reliability. Spinelli and Aguilar were concerned with search warrants issued on the basis of tips from unnamed informants. The reliability of



agent Schmidt, who was named in the affidavit and whose investigative results were included with the affidavit, was far more credible than the information considered in Aguilar and Spinelli.[10] Further, as the Court stated in Spinelli, 378 U.S. at 114:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the [illegal items] were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the inform ant . . . was 'credible' or his information 'reliable'."

The affidavit was clearly sufficient under the Spinelli - Aguilar test to permit the magistrate to issue the warrant.

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10. The F.B.I. agent had known Schmidt for over 20 years, and had personal knowledge of Schmidt's electronic expertise and his long experience in "blue box" investigations.

## LEGALITY OF INVESTIGATION UNDER STATE LAW

California Penal Code § 631 pertinent part:

> "(a) . . . Any person who intentionally taps or makes any unauthorized connection . . . with any telegraph or telephone wire . . . or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in anyway, any information so obtained . . . is punishable by a fine . . . or by imprisonment . . . or by both . . .
>
> "(b) Exceptions. This section shall not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of such public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of such public utility, or (3) to any telephonic communication system used for communication exclusively within a state county, city and count, or city correctional facility.



> "(c) Evidence. Except as proof in an action or prosecution for violation of this section, no evidence obtained in violation of this section shall be admissible in any judicial, administrative, legislative or other proceedings."

Appellants contend that the telephone company's investigation does not fall within the exceptions of § 631(b) and was in violation of state law. This argument was answered by a recent decision of the California Court of Appeals holding that "blue box" investigations by telephone companies are allowable under California law. People v. Mahoney, 47 Cal. App. 3d 699, 122 Cal. Rptr. 174 (1975). Concerning the validity of an investigation virtually identical to the one in this case, the court stated in Mahoney, 122 Cal. Rptr. at 185, n. 4:

> "Section 631, Subdivision (b), states an exception applicable to public utilities providing communications services and their agents where the acts otherwise prohibited 'are for the purpose of construction, maintenance, conduct or operation of the services and facilities of such public utility.' Though the language employed is different, it would appear that this section is consistent with the provisions of section 2511 of title 18, United States Code. As pointed out

in Hanna, supra, 404 F.2d 405, the conduct of the phone company's business requires it to detect and prevent toll fraud."[11]

We reject appellants' argument that the investigation was in violation of state law.[12]

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11. There is dictum in an earlier case, Pacific Tel. & Tel. Co. v. Superior Ct., 2 C.3d 161, 84 Cal.Rptr. 718, 465 P.2d 854 (In banc 1973) which standing alone appears to be contra to Mahoney. The investigation in Pacific Tel.& Tel. Co., however, was not limited to detecting wire fraud but consisted of monitoring and recording all of the suspect's calls in order to detect various alleged illegal activities. The explicit holding of Mahoney appears to be the better statement of California law. See also People v. Garber, 275 Cal.App.2d 119, 80 Cal. Rptr. 214 (1969), in which the court found "blue box" investigations to be permissible under pre- § 631(b) law.

12. Having concluded that the investigation did not violate California law, we do not reach the Government's contention that federal law would allow the admission of the evidence regardless of any state law prohibition. We note, however, that the court in Mahoney found the effect of federal law to be an alternative ground for holding that § 631 did not prohibit "blue box" investigations.



## ADMISSION OF EVIDENCE BY STIPULATION

Appellant Goldstein contends that her Sixth Amendment right of confrontation was violated when her attorney stipulated to the admission of evidence without her stated waiver of such right on the record. Her argument is based on Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and other cases holding that where a fundamental constitutional right is waived, the record must show a voluntary intentional waiver. A similar contention was exhaustively analyzed by this court in Wilson v. Gray, 345 F.2d 282 (9 Cir. 1965), where the court noted at 345 F. 2d 286:

> "It has been consistently held that the accused may waive his right to cross examination and confrontation and that the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or strategy. E. g., Diaz v. United States, 223 U.S. 442 (1912) . . .

After discussing the Supreme Court cases which established the guidelines for determining whether there has been an effective waiver of a federal constitutional right, the court concluded at 345 F.2d 290:

> "Variations in the factual context giving rise to the issue of waiver of any one right of the accused are

infinite. Whether the waiver of a given right under the circumstances must be made by his counsel as a matter of trial strategy or tactics is necessarily an issue that must be resolved by the common law decision-making process, the process of inclusion and exclusion."

We find nothing in the more recent Supreme Court decisions cited by counsel on the issue of waiver which indicate that the admission of evidence by stipulation must be accompanied by a formal waiver from the defendant, and we decline to fashion such a rule. Our review of the trial record indicates that appellant's strategy at the time of the trial was to challenge the legality of the telephone company's investigation rather than the evidence supporting the charges. We see no deprivation of due process in counsel's decision, without objection from appellant who was present when the stipulation was made, which requires reversal.

## SPECTOGRAPHIC VOICE IDENTIFICATION

Appellants contend that the court erred in allowing voice identification of the recorded telephone conversation by an F.B.I. agent who worked on the case rather than requiring voice print identification as requested by appellants at the trial. We find no merit in this connection.



As this court has recently noted in United States v. Turner, et al., (Slip Op. No. 73-2740, December 31, 1975) at 26, voice identification is an issue of fact which may be established by both direct and circumstantial evidence. The Turner decision gave express approval to voice identification by federal agents who had familiarized themselves with the defendants' voices during their investigation. There is no requirement in this circuit that spectographic analysis be utilized, and in fact the federal courts remain divided over the admissibility of such evidence. See United States v. Frank, 511 F.2d 25, 33 (6 Cir. 1975). In the present case, several of the recordings admitted into evidence contained references to the appellants by name. The F.B.I. agent who identified appellants' voices took voice exemplars from the appellants and had conversations with them. An adequate foundation was established to show that the government witness could identify the appellants' voices on the recordings. See Espinoza v. United States, 317 F.2d 275, 276-277 (9 Cir. 1963). We find no error in the district court's denial of appellants' demand for spectographic analysis.

## SUFFICIENCY OF EVIDENCE

Finally, appellant Goldstein argues that the evidence was insufficient to sustain her conviction. "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances'".

Glasser v. United States, 315 U.S. 60, 80 (1942). Moreover, "Circumstantial evidence is not inherently less probative than direct evidence" and under some conditions "may be even more reliable". United States v. Nelson, 419 F.2d 1237, 1239 (9 Cir. 1969). It is usually necessary to rely on circumstantial evidence where, as here, covert crimes are charged. As a reviewing court we must sustain the finding of the trial court if "there is substantial evidence taking the view most favorable to the Government, to support it".

Goldstein was employed as Roberts' secretary, and one of her duties was to place long distance telephone calls. The Government offered proof that Goldstein's voice was present in some of the fraudulent telephone calls recorded by the fraud detection device.[13] Goldstein argues that there was no direct evidence to show that she placed any of the calls and that recordings in which her voice was identified indicated only that she came to the phone after the calls were placed by someone else. It was not necessary, however, for the

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13. Goldstein contends that the voice on the recordings was not hers. After reviewing the tape recordings and voice exemplars introduced at the trial (Plaintiffs' Exhibit 14, 16B, 16C and 16D), we are persuaded, as was the trial judge, that Goldstein's voice was correctly identified by the Government.



Government to prove that Goldstein actually placed the calls. It was sufficient to show that she was acting with another in a common scheme to place phone calls in violation of the statute. United States v. Conte, 349 F.2d 304, 306 (6 Cir. 1965).

It is undisputed that the "blue box" was found on Goldstein's desk and that she was seen attempting to hide an accessory to that device when the F.B.I. searched the premises. While each of these facts alone may not have been sufficient to prove Goldstein guilty of committing wire fraud in violation of 18 U.S.C. § 1343 and of conspiring to violate the statute, the evidence taken as a whole would lead a trier of fact to conclude that Goldstein was guilty as charged.

The judgments are affirmed.

APPENDIX B

FILED

JUN 7 1976

EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>vs.<br>CAROL ANN GOLDSTEIN,<br>Defendant-Appellant. | ) | No. 75-2207 |
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>vs.<br>TOBY ROBERTS,<br>Defendant-Appellant. | ) | No. 75-2279<br>ORDER DENYING<br>PETITION FOR REHEARING |

Before: CHAMBERS and KOELSCH, Circuit Judges, and JAMESON, District Judge.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

All active judges of the court have been notified of the suggestion for a rehearing en banc and none has voted for a rehearing en banc.

APPENDIX C

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

[illegible], 1976

Re: [illegible]

Dear

An opinion was filed and a judgment entered in the above case today, [illegible] the judgment of the court below (or administrative agency).

You have (14) days, from the above date, in which to file a petition for rehearing.

The mandate of this court shall issue (21) days after entry of judgment unless the court enters an order otherwise. If a petition for rehearing is filed and denied, the mandate will issue (7) days after the entry of the order denying the petition.

Sincerely,

Emil E. Melfi, Jr.
Clerk of Court

See Rules: 36, 40(a) and 41(a) of the Federal Rules of Appellate Procedure

CO 76.2

APPENDIX D

RECEIVED JUL 1 2 1976

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

July 7, 1976

RECEIVED JUL 1 2 1976

George R. Milman, Esq.
Suite 302
9350 Wilshire Boulevard
Beverly Hills, California 90212

RE: Toby Roberts v. United States
No. A-1162

Dear Mr. Milman:

Your application for an extension of time in which to file a petition for writ of certiorari in the above-entitled case has been presented to Mr. Justice Rehnquist, who has endorsed thereon the following:

"7/7/76. Denied
W. H. R."

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Francis J. Lorson
Francis J. Lorson
Deputy Clerk

dam

cc: The Solicitor General of the United States

APPENDIX E

AFFIDAVIT

I, James L. Mahan, Special Agent of the Federal Bureau of Investigation, having been duly sworn, hereby depose and say:

That I was contacted by Mr. Walter P. Schmidt and have learned the following:

That Mr. Schmidt is employed by General Telephone Company of California as a Senior Special Agent and has received special training and experience in the field of electronic devices which are illegally used to avoid telephone charges. He has been employed by General Telephone for 25 years and for the past 14 years has been a Special Agent in General Telephone's Security Department and has specialized in investigating the use of electronic devices. He received his formal education in West Germany and was employed by the European Affiliate of International Tel. & Tel. Co., and by the Chief Signal Officer U.S. Army, Europe, as a Staff Civilian. He has supervised Telephone Company switching offices and has investigated 30-40 electronic toll fraud cases. Further, he has observed eight to ten different types of multi-frequency generators in use and has designed and built detection equipment for these devices. He has testified as an expert in this field of electronic fraud before Federal and several California Grand Juries, Federal District Courts and the Superior Courts

of Los Angeles County, Orange County and San Diego County.

Mr. Schmidt stated to me his aforementioned qualifications and that through his investigation with the Telephone Company he has determined that the occupant of 19222 Pacific Coast Highway, Apartment "C", Malibu, California is in possession of and is using a multi-frequency generator. He described a multi-frequency generator device as an electronic device which is acoustically or physically connected to telephone facilities and acts to circumvent the normal telephone billing equipment. The multi-frequency generator, thus used, and commonly known as a "Blue Box", has the capability to duplicate the method of signalling used only between Telephone Company long distance offices. This method of signalling or switching is not furnished to the customer in any equipment installed by the Company. This "Blue Box" generator activates certain circuits located in the local Telephone Company facility when a direct dial telephone call is placed so as to cause the telephone billing equipment not to function or to function improperly and thereby to cause the party who placed the call not to be billed or to be billed at a reduced incorrect rate. It essentially operates by the "Blue Box" generator emitting particular frequency pulses over the telephone line thereby simulating telephone company internal signals. The "Blue Box" enables a subscriber to re-route his calls in the long distance network at his will without registering in the local billing equipment located



at the serving central office.

Mr. Schmidt further stated that he has special computer reports indicating a large volume of calls to toll free 800 numbers from telephones in the 19222 West Pacific Coast Highway, Apartment "C", Malibu, California. From investigative techniques developed, this indicates that the 800 number is used for network entry. The computer reports so produced show that a large volume of calls to various 800 numbers were made between 3/1/74 and the present time. It is unlikely that this represents a normal pattern for calls. Due to the frequency of calls, as well as the length of individual calls, it is more likely that the calls are made as the initial stop in network manipulation. Telephone numbers beginning with an 800 area code are known as WATS (Wide Area Telephone Service lines) which a large use of telephone service obtains from the servicing telephone company on a time rental basis rather than an individual charge call basis. The numbers are primarily used by these companies to give their customers toll free access to them from locations throughout the United States. Since the dialing of an 800 number by a subscriber does not appear on his telephone bill, it is a toll free number to him. Through investigative experience, we have found that this is one method used to enter the long distance network without billing to the calling subscriber's number. Though not actually billed, this 800 number information is, however, stored in the automatic billing equipment at the telephone office. Up to and including the dialing of the 800

number, the fraud perpetrator has operated his telephone equipment in a normal manner and has now entered the long distance circuitry. If he now intends to perpetrate a fraud, he will emit from his illegal device, the "Blue Box", a 2600HZ tone The emission of this tone will disconnect the long distance network route set up by the 800 number dial. It will not release the automatic billing equipment and the billing equipment still has in its machinery the information that an 800 number was dialed. The perpetrator then sends a command frequency indicating that instructions will be sent into the network. This is followed by the telephone number fraudulently desired by the caller. The fraud perpetrator does this by pulsing all digits of said number in multi-frequency mode using his "Blue Box". When all digits are sent, another command frequency is emitted indicating to the network that all information has been received and the network can now complete switching. When the distant party reached in a fraudulent manner answers, the automatic billing equipment will now keep time. But since it is still indicating that the call was to a toll free number, the time is against the toll free number and not against the fraudulently dialed number. When the accounting document (paper tape) is processed by the computer for billing purposes to the subscriber, it will see only a given conversation time to a toll free number and ignore this entry since the computer has been programmed not to take toll free 800 calls through the billing system.



That on 12/14/73 residential type telephone service was installed under telephone numbers 456-2003, 04, 05, and 06 for Sidney Harris at 19222 W. Pacific Coast Highway, Malibu, California, 90265. The service terminates on 5 Touch Call equipped multi-line instruments of standard issued, no multi-frequency tone capability is present in any portion of the equipment installed by the Telephone Company. In addition, telephone number 454-6728 works of the same multi-line system.

That on 4/16/74 an incident counter with a Numerical Peg Count Meter was associated with Telephone line 456-2004. This unit is capable of sensing the use of the 2600 HZ disconnect signal required in the network manipulation as well as the first command frequency in Multi-frequency mode. The meter registerd 105 incidents of 2600 HZ and multi-frequency between 4/16/74 and 5/6/74.

That on 5/6/74 a Fraud Documentation Unit was associated with telephone number 456-2004. This unit will print the telephone number dialed in a normal manner to enter the network, it will print the 2600HZ indication and trigger a Magnetic Recorder for approximately 1-1 1/2 minutes to capture the fraud manipulation. This unit was removed on 5/13/74. A number of fraudulent calls have been documented.

That as of 7/17/74 the substantial calling pattern to 800 numbers evidencing fraudulent use of these telephone numbers was tontinuing. That the 7/17/74 computer information is the latest such

information available on this date.

That a dial number print paper tape showing telephone activity on 7/23/74 shows the use of a "Blue Box" apparatus.

That based on your affiant's conversations with Walter P. Schmidt and examination of Telephone Company records, it is my opinion that the evidence show that there is contraband equipment at the location set out which is being used to defraud of General Telephone Company by a scheme involving the use of wire communications equipments in interstate and foreign commerce, and involving the use of signals and sounds for the purpose of executing such schemes.

_____
JAMES L. MAHAN
Special Agent, FBI

Sworn and subscribed to before me
on this_____day of July, 1974.

_____
UNITED STATES MAGISTRATE

No. 76-195

# In the Supreme Court of the United States

OCTOBER TERM, 1976

TOBY ROBERTS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*

RICHARD L. THORNBURGH,
*Assistant Attorney General,*

JEROME M. FEIT,
MARSHALL TAMOR GOLDING,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1976

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No. 76-195

TOBY ROBERTS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 532 F. 2d 1305.

### JURISDICTION

The judgment of the court of appeals was entered on March 25, 1976. A timely petition for rehearing, with suggestion for rehearing *en banc,* was denied on June 7, 1976 (Pet. App. B). On July 7, 1976, Mr. Justice Rehnquist denied petitioner's application for an extension of time in which to file a petition for a writ of certiorari (Pet. App. D). The petition was filed on August 10, 1976, and therefore is substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether an investigation by a telephone company, involving the interception and recording of certain of petitioner's telephone calls, constituted governmental action violative of petitioner's rights under the Fourth Amendment.

2. Whether the telephone company's disclosure to law enforcement personnel of the results of the company's investigation was improper in the absence of a subpoena requiring such disclosure or other lawful authorization.

3. Whether an affidavit submitted in support of an application for a search warrant established probable cause for the search.

## STATEMENT

After a bench trial in the United States District Court for the Central District of California, petitioner was convicted on two counts of wire fraud and one count of conspiracy, in violation of 18 U.S.C. 371 and 1343. He was sentenced to concurrent terms of imprisonment for one year on each of the counts, all but 30 days of which was suspended, and was fined $500. In addition, he was directed to compensate the telephone company in the amount of $2,500 for the illegal use he had made of the company's facilities. The court of appeals affirmed (Pet. App. A) and denied a petition for rehearing with suggestion for rehearing *en banc* (Pet. App. B).

The evidence at trial, much of which was introduced in the form of stipulations, showed that petitioner had engaged in a scheme to defraud the General Telephone Company of monies due for long-distance telephone calls by using an electronic device known as a



"blue box."[1] In March 1974, Walter P. Schmidt, a security agent employed by General Telephone, concluded, based upon his analysis of a computer printout, that someone at petitioner's place of business was using a blue box to make long-distance telephone calls free of charge.[2] On April 4, 1974, Schmidt placed a 2600 Hertz frequency detector on petitioner's telephone line, which confirmed that a blue box was being used. He then placed an additional device on petitioner's line, which recorded on paper the date, time and telephone number dialed and, when triggered by the use of a blue box, recorded the first ninety seconds of each illegal telephone conversation. During the period the latter devices were permitted to operate—from May 6 through May 17—sixteen long-distance telephone calls were placed with the aid of a blue box from petitioner's place of business (Pet. App. A, pp. 2-4).

Schmidt subsequently turned over a report of his investigation to the F.B.I. The report described the procedures Schmidt had followed in confirming the use of

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[1]When attached to a telephone, a blue box permits the user to by-pass the telephone company's billing equipment on long-distance calls and to complete such calls free of charge. To make a call with a blue box, the user dials either the universal number for directory assistance (555-1212) or a toll-free number (one beginning with 800). Once a connection has been achieved, the user pushes a button on the box, which in turn emits a 2600 single frequency Hertz tone, signifying that the calling party has hung up. The blue box permits the user to remain connected to the company's long-distance network, however, and by pushing other buttons, producing different frequency tones, the user can simulate dialing and call any number in the world free of charge (see Pet. App. A, p. 3).

[2]The computer printout showed that all of the calls had been placed from a rotary phone system listed in the name of petitioner's business associate and installed in an apartment used by petitioner as a business office (Pet. App. A, p. 3).

a blue box, listed the number of fraudulent telephone calls he had detected, and identified the subscriber in whose name the telephone at petitioner's place of business was listed. Schmidt later produced, pursuant to a grand jury subpoena, the records, tapes and documents compiled during the investigation. On the basis of these materials, an affidavit was prepared and a search warrant was obtained for petitioner's place of business. Upon executing the warrant, agents of the F.B.I. discovered a blue box disguised as a calculator (Pet. App. A, pp. 4-5).

## ARGUMENT

1. Petitioner first contends (Pet. 8-13) that the telephone company's investigation was subject to the Fourth Amendment because of the status of the telephone company as a federally-regulated public utility.

None of the factors discussed by petitioner is sufficient to transform the telephone company's investigation into governmental activity subject to the Fourth Amendment. The mere fact that a privately-owned company may have been operating in interstate commerce, or that certain of its activities may have affected interstate commerce, has never been held to provide a basis for treating the company's actions as governmental in nature. Similarly, the fact that a privately-owned company is regulated by the government does not transform its actions into governmental actions; such transformation occurs only when the company exercises powers, such as the power of eminent domain, which are traditionally associated with sovereignty and have been delegated to it by the government. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351-353. In conducting the investigation at issue here, the telephone company was not acting under a delegation of authority from the government or exercising traditionally sovereign powers. Rather,



the company acted wholly independently of the government in an effort to protect its property rights. Petitioner's contention that the telephone company's investigation was subject to the strictures of the Fourth Amendment therefore must be rejected. See, *e.g.*, *United States* v. *Clegg*, 509 F. 2d 605, 609-610 (C.A. 5).[3]

2. Petitioner also contends (Pet. 16-20) that the telephone company's disclosure to law enforcement personnel of the results of the company's investigation was improper in the absence of a subpoena requiring such disclosure or other lawful authorization. As noted, however, the only material the telephone company voluntarily turned over to law enforcement personnel was an investigative report that described the procedures that had been followed in confirming the use of a blue box, listed the number of fraudulent telephone calls that had been detected, and identified the subscriber in whose name the telephone from which the fraudulent calls were being placed was listed. The material subsequently turned over by the telephone company was in response to a grand jury subpoena.

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[3]Even assuming that the telephone company's actions were governmental in nature, it would not follow that those actions violated petitioner's rights under the Fourth Amendment. The Hertz frequency detector placed on petitioner's telephone line simply confirmed that a blue box was being used. The device subsequently used by the telephone company did intercept and record the first ninety seconds of certain telephone calls— but only those telephone calls placed with the use of a blue box. Petitioner cannot have had any reasonable expectation of constitutionally-protected privacy in such circumstances, since, by using a blue box, he was trespassing on property where he had no right to be. Compare *Katz* v. *United States*, 389 U.S. 347, 352 ("One who * * * pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.").

But even if no subpoena had been used, or assuming that the statutory provisions relied upon by petitioner were applicable to the information contained in the telephone company's investigative summary, petitioner's arguments nevertheless would be without merit. The pertinent provisions of Section 605 of the Communications Act of 1934, as amended, 82 Stat. 223, 47 U.S.C. 605—which govern the conduct of persons "receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire * * * "—prohibit the divulgence of the existence or contents of wire communications except (1) "through authorized channels of transmission or reception" or (2) "as authorized by chapter 119, title 18 [18 U.S.C. 2510-2520]." The complementary provisions of 18 U.S.C. 2517 permit the use by law enforcement personnel of the contents of any wire communication so long as the officer has obtained knowledge of such communication "by any means authorized by [chapter 119] * * *."[4] One of the means of interception and disclosure specifically authorized by chapter 119 is through court order (18 U.S.C. 2516); but, as the phrase "by any means authorized" indicates, chapter 119 makes lawful as well other means of interception and disclosure. Specifically, 18 U.S.C. 2511 (2)(a)(i) provides in pertinent part that:

> [i]t shall not be unlawful under [chapter 119] for an * * * agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is

[4]18 U.S.C. 2515 similarily permits the admission into evidence at any trial, hearing or similar proceeding of any wire communication unless "the disclosure of that information would be in violation of [chapter 119]."



> a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication * * *.[5]

Petitioner's suggestions to the contrary notwithstanding (Pet. 18-20), the disclosure in the present case by the telephone company's investigator to law enforcement personnel of the results of his investigation complied with 18 U.S.C. 2511(2)(a)(i). The investigator intercepted and disclosed to law enforcement personnel the results of an investigation undertaken by him, "in the normal course of his employment," for the purpose of protecting the telephone company's property rights. As the court of appeals correctly pointed out (Pet. App. A, p. 19):

> This case does not involve unreasonable monitoring * * * . Rather, only fraudulent calls were recorded, the recordings were limited to the initial portion of the calls, and the [monitoring] device was installed only long enough to allow the company to insure that it could sustain a successful prosecution.

3. Finally, petitioner contends (Pet. 14-15) that the affidavit relied upon by the magistrate in issuing a search warrant for petitioner's place of business was deficient because the affiant did not set forth detailed information concerning the reliability of the telephone investigator.

[5]Petitioner's reliance (Pet. 16-17) upon dicta in *Hanna* v. *United States*, 404 F. 2d 405 (C.A. 5), and *Bubis* v. *United States*, 384 F. 2d 643 (C.A. 9), suggesting that a telephone company may not disclose voluntarily to law enforcement personnel information obtained by company investigation of fraudulent use of telephone facilities, is misplaced. Both of those cases were decided prior to the amendment of 47 U.S.C. 605 authorizing the disclosure of communications obtained "by any means authorized by [chapter 119] * * *" (see Pet. App. A, pp. 17-18).

The court of appeals correctly rejected this contention, noting, *inter alia,* that the investigator was named in the affidavit and the results of his investigation were set forth in summary form (Pet. App. A, pp. 20-21). The information contained in the affidavit clearly could not have been supplied by someone without substantial expertise in electronic communications. Thus, read in its entirety, the affidavit sufficiently apprised the magistrate of the basis of the affiant's belief that the information provided by the investigator was reliable.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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